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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1069

FEDERAL-BRYANT MACHINERY COMPANY,
a corporation, etc.,

Appellant,

vs.

THE DEPARTMENT OF REVENUE OF THE
STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court of Illinois.

MOTION TO AFFIRM

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The Department of Revenue of the State of Illinois, appellee herein, by William J. Scott, Attorney General of the State of Illinois, moves for an affirmance of the decision of the Supreme Court of the State of Illinois on the ground that it is manifest that the questions on which the decision of the cause depends are wholly factual and are so insubstantial as to not require further argument.

ISSUE PRESENTED

The sole issue is whether in fact the appellant-taxpayer was engaged in making retail sales within the State of Illinois or was acting merely as an agent respective of out-of-State sellers.

STATEMENT OF THE CASE

The Appellant's Statement of the Case needs amplifying to present a clearer picture of the issue presented to and decided by the Illinois Supreme Court. The appellant Federal-Bryant Machinery Company appealed directly to the Illinois Supreme Court from the judgment of the Circuit Court of Cook County, Illinois. That judgment affirmed an administrative determination of the Department of Revenue which was adverse to the appellant with respect to a deficiency assessment under the Retailers' Occupation Tax Act. Federal-Bryant Machinery Company is an Illinois corporation with offices in Chicago, Illinois. It has been the exclusive representative in specified territories of various manufacturers of machine tools whose plants are located out of Illinois and who maintain no inventory in Illinois. Prior to November of 1946, the appellant had bought machine tools from the out-of-State manufacturers it represented and resold them to purchasers in Illinois. The Department of Revenue issued a ruling in September of 1946 with respect to the taxability of agents of manufacturers situated similarly to the appellant. Certain procedures were suggested and the ruling stated that if those procedures were followed it would consider that an agency relationship existed and the transactions would not be subject to the Retailers' Occupation Tax. The agreement between the appellant and the manufacturers was modified to bring the appellant within the provisions

of the Department of Revenue's ruling. The Department of Revenue revoked its 1946 ruling effective April 1, 1951. The deficiency assessment against appellant covered the period from April 1, 1951, to August 31, 1954 inclusive. In 1957 the appellant, at the request of its manufacturers, returned to the practice that had been followed by them prior to November of 1946. In the sales involved in this case, that is between April 1, 1951 and August 31, 1954, appellant's salesmen would prepare and submit to the interested Illinois customer a proposal offering a specific machine to be built by a particular manufacturer at a stated price. The customer would prepare a purchase order based on the proposal, address it to the manufacturer in care of the appellant and mail the order to the appellant. The appellant would check the order for accuracy, copy it, and forward it to the manufacturer. When the machine was built, it would be shipped directly to the customer f.o.b. the manufacturer's plant and the appellant would be billed for the stated retail price less commission. The appellant would bill the customer and would then remit payment to appellant, usually by checks payable to the appellant but occasionally by check payable to the manufacturer. The appellant was required to guarantee the credit of each prospective purchaser whose order it forwarded to the out-of-State manufacturer. If the purchaser did not pay, the appellant was obligated to and did pay the purchase price less commission to the manufacturer.

It is the appellant's contention that the Illinois Retailers' Occupation Tax Act (Ill. Rev. Stat. 1953, Ch. 120, Secs. 440 *et seq.*) as applied to its transactions constitutes an undue burden on interstate commerce and that the statute as applied to the transactions engaged in by the appellant is unconstitutional.

ARGUMENT

THE SOLE ISSUE IS A FACTUAL QUESTION AS TO THE NATURE OF THE APPELLANT'S BUSINESS ACTIVITIES.

We quarrel only with the appellant's assertion that the Illinois Supreme Court misinterpreted the import of this Court's decision in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, *McGoldrick* v. *A. H. DuGrenier, Inc.*, 309 U.S. 70, and *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 309 U.S. 70. As the court below held in *Federal-Bryant Machinery* v. *Dept. of Revenue*, 41 Ill. 2d 64, at p. 68:

> "The ordering and billing procedures employed in these transactions also support the hearing officer's finding that plaintiff was engaged in the business of selling at retail."

Further, the court below disposed of the appellant's contention that since the machinery involved was special order machinery manufactured out of the state whether they were agent or retailer, the State lacked the power to impose the tax. At page 69 of its decision, the court stated:

> "The plaintiff contends that even if, as we have held, the transactions in question were sales by the manufacturer to the plaintiff and resales by the plaintiff to the consumers, imposition of the tax is nevertheless barred by the commerce clause of the constitution of the United States. Its position is that where the only source of supply for goods sold is located outside of the State, the transaction is interstate by necessity rather than by choice, and that a tax measured by gross receipts is therefore invalid. The Court of Appeals of New York did indeed draw such a distinction in *National Cash Register Co.* v. *Taylor*

(1937), 276 N.Y. 208, 11 N.E. 2d 881, 883, *cert. den.* 303 U.S. 656, saying: 'Here, on the contrary, the contract made outside of the state called for the delivery of goods which were manufactured outside of the state and which could not be procured within the state. Interstate commerce was contemplated and required by the contract of sale. The state has no power to impose a tax upon that kind of transaction.'

"That view was the underlying basis for the decisions of the New York courts which were reviewed in *McGoldrick* v. *Berwind-White Coal Mining Co.* (1940), 309 U.S. 33, 84 L. Ed. 565, and in the companion cases of *McGoldrick* v. *Felt & Tarrant Mfg. Co.* and *McGoldrick* v. *A. H. DuGrenier, Inc.*, 309 U.S. 70, 84 L. Ed. 584. In each of these cases the New York courts had held the tax invalid, relying upon the *National Cash Register* case. In each of these cases the Supreme Court of the United States reversed, and sustained the tax. And in doing so the court rejected the argument that the commerce clause prohibits a tax laid upon the sale of goods which crossed State boundaries pursuant to contracts which 'contemplate or require the transportation of merchandise interstate to the taxing state.' 309 U.S. at 53, 84 L. Ed. at 575."

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the decision of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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